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INTERGOVERNMENTAL NEGOTIATING COMMITTEE FOR AN
INTERNATIONAL LEGALLY BINDING INSTRUMENT FOR
THE APPLICATION OF THE PRIOR INFORMED CONSENT
PROCEDURE FOR CERTAIN HAZARDOUS CHEMICALS AND
PESTICIDES IN INTERNATIONAL TRADE

Second session

Nairobi, 16-20 September 1996

FINAL PROVISIONS

Proposal by the Chairperson

1. The Chairperson has the honour to present to the Committee in the annex to the present document the draft text of "final provisions" for an international legally binding instrument for the application of the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade, in accordance with a request of the Committee expressed at its first session (see document UNEP/FAO/PIC/INC.1/10, paragraph 62). The draft text has been prepared on the basis of the elements for the instrument contained in paragraph 89-100 of the annex to document UNEP/PIC/WG.1/4/5, as well as the discussions on those elements during the first session of the Committee. During its preparation, the relevant provisions contained in the following environmental conventions were fully taken into account:

Vienna Convention for the Protection of the Ozone Layer;

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal;

Convention on Biological Diversity;

United Nations Framework Convention on Climate Change;

United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa.

2. In the draft text, the international legally binding instrument for the application of the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade is referred to as the "Convention", without prejudice to the title of the future instrument.

Annex

DRAFT TEXT OF FINAL PROVISIONS

Article __. Settlement of Disputes¹

1. Parties shall settle any dispute between them concerning the interpretation or application of the Convention through negotiation or other peaceful means of their own choice.
2. When ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party which is not a regional economic integration organization may declare in a written instrument submitted to the Depositary that with respect to any dispute concerning the interpretation or application of the Convention, it recognizes one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:
 - (a) Arbitration in accordance with the procedure laid down in Annex __²;
 - (b) Submission of the dispute to the International Court of Justice.
3. A Party which is a regional economic integration organization may make a declaration with like effect in relation to arbitration in accordance with the procedure referred to in paragraph 2 (a).
4. A declaration made pursuant to paragraph 2 shall remain in force until it expires in accordance with its terms or until three months after written notice of its revocation has been deposited with the Depositary.
5. The expiry of a declaration, a notice of revocation or a new declaration shall not in any way affect proceedings pending before an arbitral tribunal or the International Court of Justice unless the parties to the dispute otherwise agree.
6. If the parties to the dispute have not accepted a common compulsory means of dispute settlement, in accordance with paragraph 2 above, and if they have not been able to settle their dispute within twelve months following

¹ Reference: Convention on Biological Diversity (CBD), Article 27; United Nations Framework Convention on Climate Change (FCCC), Article 14; United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (CCD), Article 28; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), Article 20; Vienna Convention for the Protection of the Ozone Layer (Vienna Convention), Article 11.

² See Part 1 of the Appendix.

notification by one Party to another that a dispute exists between them, the dispute shall be submitted to conciliation at the request of any Party to the dispute in accordance with Annex ___³ unless the parties otherwise agree.

7. The provisions of this Article shall apply with respect to any protocol except as otherwise provided in the protocol concerned.

Article __. Amendments to the Convention⁴

1. Amendments to this Convention may be proposed by any Party.

2. Amendments to this Convention shall be adopted at a meeting of the Conference of the Parties. The text of any proposed amendment to this Convention shall be communicated to the Parties by the Secretariat at least six months before the meeting at which it is proposed for adoption. The Secretariat shall also communicate proposed amendments to the signatories to this Convention and, for information, to the Depositary.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a [two-thirds⁵][three-fourths⁶] majority vote of the Parties present and voting at the meeting, and shall be submitted by the Depositary to all Parties for ratification, acceptance or approval.

4. Ratification, acceptance or approval of amendments shall be notified to the Depositary in writing. Amendments adopted in accordance with paragraph 3 above shall enter into force for those Parties having accepted them on the ninetieth day after the deposit of instruments of ratification, acceptance or approval by at least [two-thirds⁷][three-fourths⁸] of the Parties to this Convention. Thereafter the amendments shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, acceptance or approval of the amendments.

5. For the purposes of this Article, "Parties present and voting" means Parties present and casting an affirmative or negative vote.

³ See Part 2 of the Appendix.

⁴ Reference: CBD, Article 29; FCCC, Article 15.

⁵ Reference: CBD, Article 29, paragraph 3.

⁶ Reference: FCCC, Article 15, paragraph 3.

⁷ Reference: CBD, Article 29, paragraph 4.

⁸ Reference: FCCC, Article 15, paragraph 4.

Article __. Adoption and Amendment of Annexes⁹

1. Annexes to this Convention shall form an integral part thereof and, unless expressly provided otherwise, a reference to this Convention constitutes at the same time a reference to any annexes thereto. Such annexes shall be restricted to procedural, scientific, technical or administrative matters.

2. The following procedure shall apply to the proposal, adoption and entry into force of additional annexes to this Convention:

(a) Additional annexes shall be proposed and adopted according to the procedure laid down in Article __¹⁰;

(b) Any Party that is unable to approve an additional annex shall so notify the Depositary, in writing, within one year from the date of the communication of the adoption of the additional annex by the Depositary. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time withdraw a previous declaration of objection in respect of any additional annex and the annexes shall thereupon enter into force for that Party subject to subparagraph (c) below;

(c) On the expiry of one year from the date of the communication by the Depositary of the adoption of an additional annex, the annex shall enter into force for all Parties to this Convention which have not submitted a notification in accordance with the provisions of subparagraph (b) above.

3. The proposal, adoption and entry into force of amendments to annexes to this Convention shall be subject to the same procedure as for the proposal, adoption and entry into force of annexes to the Convention.

4. If an additional annex or an amendment to an annex is related to an amendment to this Convention, the additional annex or amendment shall not enter into force until such time as the amendment to the Convention enters into force.

Article __. Protocols¹¹

1. The Conference of the Parties may at a meeting adopt protocols.

2. The text of any proposed protocol shall be communicated to the Parties by the Secretariat at least six months before such a meeting.

⁹ Reference: CBD, Article 30; FCCC, Article 16.

¹⁰ Put a cross-reference to an article governing amendments to the Convention.

¹¹ Reference: FCCC, Article 17; CBD, Articles 28 and 32; Vienna Convention, Articles 8 and 16.

3. The requirements for the entry into force of any protocol shall be established by that protocol.
4. Only Parties to this Convention may be Parties to a protocol.
5. Decisions under any protocol shall be taken only by the Parties to the protocol concerned.

Article __. Right to Vote¹²

1. Subject to paragraph 2 below, each Party to this Convention shall have one vote.
2. A regional economic integration organization [that is a Party to this Convention together with one or more of its member States], on matters within its competence, may exercise a number of votes equal to the number of its member States that are Parties to this Convention. Such an organization shall not exercise its right to vote if any of its member States exercises its right to vote, and vice versa.

Article __. Signature¹³

This Convention shall be open for signature at __ by all States and any regional economic integration organization [to which its Member States have transferred competence in respect of matters governed by this Convention]¹⁴ from __ to __, and at the United Nations Headquarters in New York [the Headquarters of the Food and Agriculture Organization of the United Nations in Rome] from __ to __.

¹² Reference: CBD, Article 31; FCCC, Article 18; CCD, Article 32; Vienna Convention, Article 15.

¹³ Reference: CBD, Article 33; Vienna Convention, Article 12.

¹⁴ The term "regional integration organization" may be defined at the beginning of the text, so that it does not have to be explained every time it is referred to in the text. A possible definition may read as follows: "Regional economic integration organization" means an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention [or its protocols] and [which] has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it [the instruments concerned]." (Reference: Article 2 of the Convention on Biological Diversity; Article 1 of the UN Framework Convention on Climate Change).

Article __. Ratification, Acceptance, Approval or Accession¹⁵

1. This Convention shall be subject to ratification, acceptance or approval by States and by any regional economic integration organizations. It shall be open for accession by States and by regional economic integration organizations [to which its member States have transferred competence in respect of matters covered by this Convention]¹⁶ from the date on which the Convention is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depository.

2. Any regional economic integration organization which becomes Party to this Convention without any of its member States being a Party shall be bound by all the obligations under the Convention. In the case of such organizations, one or more of whose member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under the Convention concurrently.

3. In its instrument of ratification, acceptance, approval or accession, a regional economic integration organization shall declare the extent of its competence in respect of the matters governed by this Convention. Any such organization shall also inform the Depository, who shall in turn inform the Parties, of any relevant modification in the extent of its competence.

Article __. Entry into Force¹⁷

1. This Convention shall enter into force on the [ninetieth]¹⁸ day after the date of deposit of the [twentieth]¹⁹[thirtieth]²⁰[fiftieth]²¹ instrument of ratification, acceptance, approval or accession.

¹⁵ Reference: CBD, Articles 34-35; Vienna Convention, Articles 13-14; FCCC, Article 22.

¹⁶ See footnote 14.

¹⁷ Reference: FCCC, Article 23; CBD, Article 36.

¹⁸ Reference: CBD, Article 36, paragraph 1; FCCC, Article 23, paragraph 1; CCD, Article 36, paragraph 1; Basel Convention, Article 25, paragraph 1; Vienna Convention, Article 17, paragraph 1.

¹⁹ Reference: Vienna Convention, Article 17, paragraph 1; Basel Convention, Article 25, paragraph 1.

²⁰ Reference: CBD, Article 36, paragraph 1.

²¹ Reference: FCCC, Article 23, paragraph 1; CCD, Article 36, paragraph 1.

2. For each State or regional economic integration organization that ratifies, accepts or approves the Convention or accedes thereto after the deposit of the [twentieth][thirtieth][fiftieth] instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or regional economic integration organization of its instrument of ratification, acceptance, approval or accession.

3. For the purpose of paragraphs 1 and 2 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

Article __. Reservations²²

No reservation may be made to this Convention.

Article __. Withdrawal²³

1. At any time after [two]²⁴[three]²⁵[four]²⁶ years from the date on which this Convention has entered into force for a Party, that Party may withdraw from the Convention by giving written notification to the Depositary.

2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such date as may be specified in the notification of withdrawal.

3. Any Party that withdraws from the Convention shall be considered as also having withdrawn from any protocol to which it is a Party.

Article __. Interim Arrangements²⁷

[to be developed]

²² Reference: CBD, Article 37; FCCC, Article 24.

²³ Reference: CBD, Article 38; FCCC, Article 25.

²⁴ Reference: CBD, Article 38, paragraph 1.

²⁵ Reference: FCCC, Article 25, paragraph 1; CCD, Article 38, paragraph 1; Basel Convention, Article 27, paragraph 1.

²⁶ Reference: Vienna Convention, Article 19, paragraph 1.

²⁷ For example, see CBD, Article 40.

Article __. Depository²⁸

The Secretary-General of the United Nations [Director-General of the Food and Agriculture Organization of the United Nations] shall be the Depository of this Convention and of any protocols adopted in accordance with Article __²⁹.

Article __. Authentic texts³⁰

The Arabic, Chinese, English, French, Russian and Spanish texts of this Convention are equally authentic.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Convention.

Done at _____ on this __ day of __, one thousand nine hundred and ninety-seven.

²⁸ Reference: FCCC, Article 19; CBD, Article 41.

²⁹ Put a cross-reference to an article governing protocols.

³⁰ Reference: FCCC, Article 26; CBD, Article 42.

AppendixPart 1³¹**ARBITRATION***Article 1*

The claimant party shall notify the secretariat that the parties are referring a dispute to arbitration pursuant to Article ___³². The notification shall state the subject matter of arbitration and include, in particular, the articles of the Convention or the protocol, the interpretation or application of which are at issue. If the parties do not agree on the subject matter of the dispute before the President of the tribunal is designated, the arbitral tribunal shall determine the subject matter. The Secretariat shall forward the information thus received to all Parties to this Convention or to the protocol concerned.

Article 2

1. In disputes between two parties, the arbitral tribunal shall consist of three members. Each of the parties to the dispute shall appoint an arbitrator and the two arbitrators so appointed shall designate by common agreement the third arbitrator who shall be the President of the tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.
2. In disputes between more than two parties, parties in the same interest shall appoint one arbitrator jointly by agreement.
3. Any vacancy shall be filled in the manner prescribed for the initial appointment.

Article 3

1. If the President of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Secretary-General of the United Nations [Director-General of the Food and Agriculture Organization of the United Nations] shall, at the request of a party, designate the President within a further two-month period.

³¹ Reference: CBD, Annex II, Part 1; The Arbitration Procedure under Article 11, paragraph 3(a) of the Vienna Convention, adopted in Decision 7 of the First Meeting of the Conference of the Parties.

³² Put a cross-reference to an article of the Convention governing settlement of disputes.

2. If one of the parties to the dispute does not appoint an arbitrator within two months of receipt of the request, the other party may inform the Secretary-General of the United Nations [Director-General of the Food and Agriculture Organization of the United Nations] who shall make the designation within a further two-month period.

Article 4

The arbitral tribunal shall render its decisions in accordance with the provisions of this Convention, any protocols concerned, and international law.

Article 5

Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own rules of procedure.

Article 6

The arbitral tribunal may, at the request of one of the parties, recommend essential interim measures of protection.

Article 7

The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, information and facilities; and

(b) Enable it, when necessary, to call witnesses or experts and receive their evidence.

Article 8

The parties and the arbitrators are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings of the arbitral tribunal.

Article 9

Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the costs of the tribunal shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its costs, and shall furnish a final statement thereof to the parties.

Article 10

Any Party that has an interest of a legal nature in the subject matter of the dispute which may be affected by the decision in the case, may intervene in the proceedings with the consent of the tribunal.

Article 11

The tribunal may hear and determine counterclaims arising directly out of the subject matter of the dispute.

Article 12

Decisions both on procedure and substance of the arbitral tribunal shall be taken by a majority vote of its members.

Article 13

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or a failure of a party to defend its case shall not constitute a bar to the proceedings. Before rendering its final decision, the arbitral tribunal must satisfy itself that the claim is well founded in fact and law.

Article 14

The tribunal shall render its final decision within five months of the date on which it is fully constituted unless it finds it necessary to extend the time-limit for a period which should not exceed five more months.

Article 15

The final decision of the arbitral tribunal shall be confined to the subject matter of the dispute and shall state the reasons on which it is based. It shall contain the names of the members who have participated and the date of the final decision. Any member of the tribunal may attach a separate or dissenting opinion to the final decision.

Article 16

The award shall be binding on the parties to the dispute. It shall be without appeal unless the parties to the dispute have agreed in advance to an appellate procedure.

Article 17

Any controversy which may arise between the parties to the dispute as regards the interpretation or manner of implementation of the final decision may be submitted by either party for decision to the arbitral tribunal which rendered it.

Part 2³³**CONCILIATION***Article 1*

A conciliation commission shall be created upon the request of one of the parties to the dispute. The Commission shall, unless the parties otherwise agree, be composed of five members, two appointed by each Party concerned and a President chosen jointly by those members.

Article 2

In disputes between more than two parties, parties in the same interest shall appoint their members of the commission jointly by agreement. Where two or more parties have separate interests or there is a disagreement as to whether they are of the same interest, they shall appoint their members separately.

Article 3

If any appointments by the parties are not made within two months of the date of the request to create a conciliation commission, the Secretary-General of the United Nations [Director-General of the Food and Agriculture Organization of the United Nations] shall, if asked to do so by the party that made the request, make those appointments within a further two-month period.

Article 4

If a President of the conciliation commission has not been chosen within two months of the last of the members of the commission being appointed, the Secretary-General of the United Nations [Director-General of the Food and Agriculture Organization of the United Nations] shall, if asked to do so by a party, designate a President within a further two-month period.

Article 5

The conciliation commission shall take its decisions by majority vote of its members. It shall, unless the parties to the dispute otherwise agree, determine its own procedure. It shall render a proposal for resolution of the dispute, which the parties shall consider in good faith.

Article 6

A disagreement as to whether the conciliation commission has competence shall be decided by the commission.

³³

Reference: CBD, Annex II, Part 2.